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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WSS INDUSTRIAL CONSTRUCTION,
INC.,

Plaintiff and Respondent.

v.

GREAT WEST CONTRACTORS, INC.,
et al.,

Defendants and Appellants,

B194913

(Los Angeles County
Super. Ct. No. BC323833)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Malcolm H. Mackey, Judge. Remanded with directions.

Pitre & Teunisse, Patricia A. Teunisse and Carole M. Pitre for Defendants and Appellants.

Hunter, Molloy & Salcido, John Logan Hunter and David A. Delgado for Plaintiff and Respondent.

* * * * *

Great West Contractors, Inc. (Great West) entered an agreement with a subcontractor, WSS Industrial Construction, Inc. (WSS). In a prior appeal, we reversed a judgment for breach of contract in favor of WSS because it was not licensed at relevant times and did not show that it substantially complied with the licensing requirements. The sole issue raised in the current appeal is WSS's entitlement to attorney fees following our reversal in the prior appeal. We shall vacate the judgment underlying this appeal because the trial court lacked jurisdiction to enter it while the prior appeal was pending in this court.

FACTUAL AND PROCEDURAL BACKGROUND

1. Trial Court Proceedings

WSS sued Great West alleging among other things: WSS performed all requirements of the contract and was still owed \$91,494.28.¹ The contract provided for attorney fees and costs. Section 27 of the parties' contract provides: "In the event either Contractor or Subcontractor institutes suit in court or in arbitration against the other party, or against the surety of such party, in connection with any dispute or matter arising under this Agreement, the party which prevails in the suit shall be entitled to recover from the other its attorneys' fees and other legal costs." Great West cross-complained alleging a cause of action for breach of contract against WSS.

A jury entered an award in favor of WSS and the trial court entered a "revised judgment" on the jury verdict on March 21, 2006. The revised judgment quotes the entire jury award. Then, it indicates that judgment is to be entered against Great West Contractors on the fifth cause of action for breach of contract; WSS is to recover prejudgment interest; and WSS is to recover fees and costs. The March 21st judgment also indicates that Fidelity and Deposit Company of Maryland and United States Fire Insurance Company and Developers Surety and Indemnity Company are jointly and severally liable, each on different causes of action.

¹

We take judicial notice of the record in the prior appeal *Great West Contractors, Inc. et al. v. WSS Industrial Construction, Inc.* (2008) 162 Cal.App.4th 581.

The revised judgment provided in pertinent part as follows:

- “1. WSS shall have judgment in the principal amount of \$190,012.62 against Great West Contractors, Inc. on the Fifth Cause of Action for Breach of Contract. [¶] . . . [¶]
- “3. WSS is the prevailing party and shall have judgment against Great West for costs and fees in the amount of \$_____. [¶] . . . [¶]
- “8. Cross-Complainant Great West shall take nothing on its Cross-Complaint against WSS.”

On August 31, 2006, the court issued another “revised judgment.” Like the March 21st judgment, the August 31st judgment quotes the entire jury verdict, enters judgment, prejudgment interest, and allows for attorney fees. It also finds Fidelity and Deposit Company of Maryland jointly and severally liable on the eighth cause of action for recovery on payment of bond. Then, it indicates that Great West shall take nothing on its cross-complaint. The August judgment does not include other defendants that had been found jointly and severally liable in the March judgment.

Among other modifications, the August judgment revised paragraph 3 as follows: “WSS is the prevailing party and shall have judgment against Great West for costs in the amount of \$9,340.39 and fees in the amount of \$165, 601.25.”

2. *Prior Appeal*

On June 5, 2006, Great West filed a notice of appeal from the March 21, 2006 judgment “and all orders encompassed therein, including but not limited to any attorney fee award and or costs made subsequent to the filing of this notice of appeal, the motion for attorney fees by plaintiff now pending for hearing; from the order denying Defendant’s Motion for Judgment Notwithstanding the Verdict . . . and from the order denying the motions for non-suit.” Fidelity and Deposit Company of Maryland filed a notice of appeal from the judgment entered March 21, 2006, and the order denying the judgment notwithstanding the verdict. The appellant’s appendix included a copy of the revised judgment specifying the amount of costs and attorney fees, but neither party raised any issue with respect to attorney fees or with respect to the revised judgment.

We concluded that WSS was barred from any recovery because it was unlicensed during a period which it performed work under the contract and because there was no substantial compliance with the licensing requirements. (*Great West Contractors, Inc., et al. v. WSS Industrial Construction, Inc., supra*, 162 Cal.App.4th at pp. 593, 596.) Our disposition was as follows: “The judgment is reversed. The matter is remanded with instructions to the trial court to vacate the judgment and enter judgment in favor of Great West and Fidelity. Great West and Fidelity shall recover their costs in this proceeding. [Citation.]” (*Id.* at p. 597.)

3. *Current Appeal*

The notice of appeal in the current appeal provides: “Defendant and Appellant Great West Contractors, Inc., appeals to the Court of Appeal of the State of California, Second Appellate District, from the award of attorney fees made in the Revised Judgment on Jury Verdict entered on August 31, 2006.”

DISCUSSION

I. *The Trial Court Lacked Jurisdiction to Modify the Judgment While the Case Was Pending on Appeal*

In addition to specifying the amount of that attorney fee award, the August 31st judgment purports to enter judgment on the jury verdict that we reversed and ordered vacated in the prior appeal. “The general rule is that once a judgment has been entered, the trial court loses its unrestricted power to change that judgment. The court does retain power to correct clerical errors in a judgment which has been entered. However, it may not amend such a judgment to substantially modify it or materially alter the rights of the parties under its authority to correct clerical error[s]. [Citations.] This general rule is applicable even though time for appeal from the judgment has not yet passed. [Citation.] [¶] Once judgment has been entered, the trial court does retain jurisdiction for a limited period of time to entertain and grant a motion for a new trial ([Code Civ. Proc.], § 655 et seq.) or a motion for a judgment notwithstanding the verdict. ([Code Civ. Proc.], § 629.) The court also retains jurisdiction to consider and grant a motion to vacate a judgment and enter a different judgment for either of two reasons: an incorrect or erroneous legal

basis for the decision, not consistent with or supported by the facts, or a judgment not consistent with or not supported by the special verdict. ([Code Civ. Proc.,] §§ 663, 663a.) The court also retains jurisdiction to entertain and grant a motion for relief from a judgment taken against a party through mistake, inadvertence, surprise, or excusable neglect. ([Code Civ. Proc.,] § 473.) [Citations.]” (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1237; see also Code Civ. Proc., § 916; *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864.)

Here, the August 31st judgment makes substantial modifications. For example, it excludes United States Fire Insurance Company and Developers Surety and Indemnity Company, who had been found jointly and severally liable in the March 21st judgment. Conduct in absence of jurisdiction is a nullity. (*Kinard v. Jordan* (1917) 175 Cal. 13, 16.) The August 31st judgment is a nullity because it was entered when the trial court no longer had jurisdiction. No exception is applicable here.

II. Assuming the Court Had Followed Proper Procedures, the Reversal of the Prior Judgment Negates the Basis for WSS’s Fees

A trial court does have jurisdiction to consider postjudgment an attorney fee award. (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 368.) “When a judgment includes an award of costs and fees, often the amount of the award is left blank for future determination. . . . When the order setting the final amount is filed, the clerk enters the amounts on the judgment nunc pro tunc. [Citation.]” (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 996-997.) Where a judgment awards costs to a prevailing party with the amount to be determined at a later time, the notice of appeal subsumes the later order setting the amount of the award. (*Nazemi v. Tseng* (1992) 5 Cal.App.4th 1633, 1639.) In contrast, where the judgment does not include a fee award, the judgment does not “subsume” a later fee award. (*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 44.) A court may review the entitlement to fees when considering a postjudgment order setting the amount of fees. (*P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1055.)

What should have happened in this case is that instead of entering a second revised judgment while the appeal was pending in this case, the trial court should have issued an order setting the amount of the attorney fees. The March 21st judgment could have been amended nunc pro tunc to include that amount. (*Grant v. List & Lathrop, supra*, 2 Cal.App.4th at pp. 996-997.) Or Great West could have appealed from a postjudgment order awarding fees. (*P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority, supra*, 98 Cal.App.4th at p. 1055.)

Assuming for the moment as the parties do that the trial court had employed correct procedures, reversal of the attorney fee award would be required because WSS is no longer the prevailing party. ““The successful party is never required to pay the costs incurred by the unsuccessful party.”” (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284.) WSS argues the award of attorney fees should be affirmed because Great West cross-complained against WSS, and the court found that Great West shall take nothing on its cross-complaint. Without citation to the record, WSS states the trial court “award[ed] WSS its fees and costs for having prevailed on the Cross-Complaint” and its entire argument flows from that premise.

The record lacks support for WSS’s characterization of the judgment as one that awarded fees and costs to it on Great West’s cross-complaint. There is no discussion of fees on the cross-complaint during the hearing on attorney fees and no indication that the cross-complaint was the basis for the attorney fee award. WSS cites to nothing in the record supporting its interpretation. The judgment announces the amount due on the breach of contract cause of action and then awards fees and costs. Later, the cross-complaint is mentioned with no discussion of fees and costs, undermining WSS’s argument that the fees and costs were awarded based on the cross-complaint. Thus, assuming that a viable fee award remained, reversal would be required. (*Allen v. Smith, supra*, 94 Cal.App.4th at p. 1284.)

DISPOSITION

The case is remanded to the trial court. The trial court is directed to vacate its August 31, 2006 judgment. Each side to bear its own costs on appeal.

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COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.